

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



Legal Counsel Division

April 5, 2007

Joseph Fengler
Chair, Advisory Neighborhood Commission 6A
Box 75115
Washington, D.C. 20013

Re: Applicability of the District's Open Meetings Act, the Freedom of Information Act and ANC notice provisions to the Public Charter School Board

Dear Commissioner Fengler:

This responds to your March 14, 2007 letter, in which you seek legal advice concerning the applicability of the District's various "sunshine" laws to the Public Charter School Board. You pose five questions which cover the Open Meetings Act, the Freedom of Information Act and the Advisory Neighborhood Commissions (ANC) Act and its requirements that ANCs be given notice of certain government proposed actions.

For context, you give the following background. You state that on February 26, 2007, a commissioner representing your ANC attempted to present an ANC resolution to the Public Charter School Board (PCSB or Board) and to address the Board during one of its meetings. The matter involved whether the AppleTree Early Learning Public Charter School should be granted an enrollment increase and the ANC wished to present its views. The Commissioner was advised by the Board Chairman that it was not a public hearing and that no one would be heard. The Chairman also advised the Commissioner that PCSB requires one week advance notice of any intention to address the Board and a summary of the substance of the address, after which the Board would decide whether it wants to receive such information.¹

Your questions are answered separately below in the order in which you present them.

(1) "If there are legal requirements under D.C. Law that require the Public Charter School Board (PCSB) to conduct open proceedings, hearings, and meetings, and to make available for public inspection the files and records of the PCSB?"

¹ For purposes of this analysis, I assume the representations made by you are true and accurate. I do not, however, make any formal finding of fact, nor have I conducted a factual investigation into this matter.

The PCSB was established “within the District of Columbia Government.” (Emphasis added.) D.C. Official Code § 38-1802.14 (2006 Supp.).² The Board is an “eligible chartering authority” and may approve petitions to establish public charter schools in the District (D.C. Official Code § 38-1802.01), is required to monitor the operations of each school to which it has granted a charter (D.C. Official Code § 38-1802.11), and is “authorized to use the services, personnel, and facilities of the District of Columbia” (D.C. Official Code § 38-1802.14(d)(2)). The Board is also required to hold meetings (at the call of the Chair) for such purposes as considering petitions to grant a charter (D.C. Official Code § 38-1802.03), renew a charter (D.C. Official Code § 38-1802.12) or revoke a charter (D.C. Official Code § 38-1802.13).

The District’s “Open Meetings Act” is contained in section 742 of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 774, Pub. L. 93-198, D.C. Official Code § 1-207.42 (2006 Repl.), and requires that “[a]ll meetings of any department, agency, board, or commission . . . at which official action of any kind is taken shall be open to the public.” It also requires that a written transcript or transcription of any meeting required to be open under the act must be kept and made available to the public. D.C. Official Code § 1-207.42 (b) (2006 Repl.).

Although the term “official action” is not expressly defined by the Open Meetings Act, we have concluded on previous occasions that its definition in the open meetings context is consistent with its definition in the District’s anti-bribery laws, which offers the following definition: “Official Action means any decision, opinion, recommendation, judgment, vote, or other conduct that involves an exercise of discretion on the part of the public servant.” D.C. Official Code § 22-711(3) (2001). Thus, any such exercise of discretionary authority taken by the PCSB in which a decision is made would be subject to the Open Meetings Act, including its aforementioned statutory duties (*i.e.*, considering charter petitions, renewals and revocations). And, to the extent the type of conduct you describe herein would also involve discretionary activity (*i.e.*, considering whether to increase the enrollment of an existing charter school) the term “official action” would, in all likelihood, apply as well.

(2) “Whether the City’s ANCs are entitled to the standard D.C. Government 30-day notice requirements of hearings, meetings, decisions and pending action on matters that affect their ANC?”

ANCs derive their authority to receive notice of various government activity from two sources: (1) the authorizing laws of a particular agency or entity which might expressly require notice to ANCs under specified circumstances; and (2) the Advisory Neighborhood Commissions establishment laws that set forth when ANC notice is required and by whom. In the first instance, ten (10) days written notice to ANCs is expressly required by the Charter School Act whenever the PCSB considers a petition to

² This statute was enacted by Congress in An Act making appropriations for fiscal year 1996 to make a further downpayment toward a balanced budget, and for other purposes, approved April 26, 1996, 110 Stat. 1321, Pub. L. 104-134, Title II (District of Columbia School Reform Act of 1995 (Charter School Act), § 2001 *et seq.*)

grant or revise a public school charter. D.C. Official Code § 38-1802.03(c)(3) (2001).³ Although there are not parallel requirements for other Board actions in the Charter School Act such as charter renewal or revocation proceedings, the absence of such provisions is not dispositive to the question of whether additional notice provisions contained elsewhere might apply. In fact, such additional provisions are found in the ANC act itself and are applicable to the PCSB.

Section 13(a)-(c) of the Advisory Neighborhood Commissions Act of 1975, effective October 10, 1975, D.C. Law 1-21, as amended by the Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000, effective June 27, 2000, D.C. Law 13-135, D.C. Official Code § 1-309.10(a)-(c) (2006 Repl.) (collectively, the ANC Act) sets forth the types of actual or proposed government actions for which ANCs are to receive thirty (30) days advance written notice. This includes the following:

(a) Each Advisory Neighborhood Commission ("Commission") may advise the Council of the District of Columbia, the Mayor and each executive agency, and all **independent agencies, boards and commissions** of the government of the District of Columbia with respect to all proposed matters of District government policy including, but not limited to, decisions regarding planning, streets, recreation, social services programs, **education**, health, safety, budget, and sanitation which affect that Commission area. (Emphasis added.)

D.C. Official Code § 1-309.10(a) (2006 Repl.).⁴

Education is expressly mentioned in § 1-309.10(a) as a subject for which an ANC may advise the other parts of the government (and to receive the necessary notice to enable it to do so). Admittedly, however, that is not the end of the analysis.

The D.C. Court of Appeals in *Kopff v. Dist. of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1373, 1380-81 (D.C. 1977), stated that any notice obligations created in the D.C. Code are limited by the Home Rule Act. The pertinent section of the Home Rule Act can be found in the D.C. Official Code § 1-207.38. It states that timely notice shall be given to an ANC for matters "of significance to neighborhood planning and development within its neighborhood commission area." D.C. Official Code § 1-207.38(d) (2001). The phrase "of significance" was interpreted by the Court in *Kopff* to place a limit on the situations in which an ANC was required to receive notice, even if the subject is explicitly listed in § 1-309.10(a). *Kopff*, 381 A.2d at 1381.

In general *Kopff* requires that notice be given to the ANC for actions which affect neighborhood planning and development if a public hearing is required by law. *Id.* The

³ Such ten (10) day notice is also required whenever a petition to revise an existing charter is filed. D.C. Official Code § 38-1802.04(c)(10) (2006 Supp.).

⁴ Though this subsection states only that these are matters for which the ANC may "advise" the governmental entity and does not specifically mention "notice," notice nonetheless is implied by law insofar as subsection (c) expressly refers to "notices required in subsection (a)" when listing the types of actions or proposed actions that trigger the notice requirement. And, subsection (b) makes such notice period thirty (30) days. D.C. Official Code § 1-309.10 (b) and (c) (2006 Repl.).

requirement to hold a public hearing is taken to be an implicit determination by the legislator that the proposed government action is significant. *Id.* However, there may be infrequent situations where an ANC is entitled to receive notice about matters affecting its neighborhood, but for which a public hearing is not required.⁵ Id.

This Office has issued three earlier interpretations concerning ANC notice requirements. The first holds that notice is not required for the issuance of Asbestos Abatement Permits (April 23, 2004, Memorandum to Kenneth Campbell), the second, that the Office of Planning is not exempt from giving notice to ANCs (August 16, 2004, Letter to Absalom Jordan) and the third, that the ANC notice requirements apply to the District of Columbia Board of Education (June 20, 2005, Letter to Robert Vinsom Brannum).

In the instant case and under the circumstances you describe, it is unclear to us whether notice would have been required. Certainly, if there was a public hearing at which official action was considered with regard to the request to increase the enrollment size of the charter school, or if there was a meeting at which official action was taken on the request – a meeting that the Open Meetings Act requires to be open to the public – ANC notice requirements would apply for two reasons. First, assuming that a request to increase the enrollment of a charter school requires a revision to the original charter, the ten (10) day advance notice requirement to ANCs expressly contained in the Charter School Act for a public hearing would have been triggered. D.C. Official Code § 38-1802.04 (c)(10) (“A public charter school seeking to revise its charter shall prepare a petition for approval The provisions of § 38-1802.03 shall apply to such a petition in the same manner as such provisions apply to a petition to establish a public charter school.”).

Second, the ANC Act separately would require notice to the ANC – not only if there was to be a public hearing or public meeting at which official action was to be taken on the request, but also arguably because such action can be viewed as a matter of “significance” insofar as any school expansion in a community would necessarily affect the surrounding neighborhood and its residents.

The only other issue, then, if notice was in fact required, is whether the PCSB should have utilized the ten (10) day notice provision contained in the Charter School Act or the thirty (30) day notice period in the ANC Act. Applying the rule of statutory interpretation that every effort must be made to reconcile allegedly conflicting statutes and to give effect to the language and intent of both, I conclude that the shorter, express requirement of the ten (10) day notice period enacted by Congress in the Charter School Act modifies the more general ANC thirty (30) day notice provisions contained in the Council initiated ANC Act. *See Myers v. Hollister*, 226 F.2d 346, 348 (1955), *cert. denied*, 350 U.S. 987 (1956). Where PCSB activity occurs for which the Charter School Act would not require notice, but for which the ANC Act would nonetheless require ANCs to be notified, the regular thirty (30) day notice period would apply. Consequently, at the very least, the ANC should have received at least ten (10) days

⁵ The D.C. Court of Appeals stated in *Kopff* that “while it is difficult to conceive of many matters, not requiring a hearing, which would be sufficiently significant to neighborhood planning and development to warrant a special notice to an ANC, we do not wish categorically to exclude all such cases.” *Kopff*, 381 A.2d at 1381.

advance notice of any public hearing in which a petition to revise a school charter was to be considered.

(3) “Whether documents and communications of PCSB are available without charge to ANCs or, at the very least, subject to FOIA?”

The District’s Freedom of Information Act (D.C. FOIA) applies to the PCSB as a “public body.” Freedom of Information Act of 1976, effective March 29, 1977, D.C. Law 1-96, D.C. Official Code § 2-531 *et seq.* (2006 Repl.). Moreover, there is an express provision in the ANC Act, which states: “Each Commission shall have access to District government officials and to all District government official documents and public data pursuant to § 2-531 *et seq.* [D.C. FOIA] that are material to the exercise of its development of recommendations to the District government.” D.C. Official Code § 1-309.10(i)(1) (2006 Repl.).

The D.C. FOIA statute applies to “any public record of a public body.” D.C. Official Code § 2-532(a) (2006 Repl.). A “public body” is defined as “the Mayor, an agency, or the Council of the District of Columbia.”⁶ The term “agency” is defined as including both subordinate agencies and independent agencies. D.C. Official Code § 2-502(3) (2006 Repl.). A “Subordinate Agency” is defined as “any officer, employee, office, department, division, board, commission, or other agency of the government of the District, other than an independent agency or the Mayor or the Council, required by law or the Mayor or the Council to administer any law or any rule adopted under the authority of a law.” D.C. Official Code § 2-502(5) (2006 Repl.). An “Independent Agency” is defined as “any agency of the government of the District with respect to which the Mayor and the Council are not authorized by law, other than this act, to establish administrative procedures, but does not include the several courts of the District and the Tax Division of the Superior Court.” D.C. Official Code § 2-502(5) (2006 Repl.).

As previously stated, the PCSB was created by Congress and established as an entity “within the District of Columbia government.” D.C. Official Code § 38-1802.14 (a)(1) (2006 Supp.). As a result, whether it is designated as a subordinate or independent agency, it is in all cases a public body for purposes of the D.C. FOIA statute and its “public records” therefore are subject to the act’s disclosure requirements.

(4) “Whether the communications, written and electronic, between members of the Board, the officers and/or the staff are subject to FOIA?”

As previously stated, the D.C. FOIA statute requires the disclosure of “public records.” Public records are defined as “all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. Public records include information stored in an electronic format.” D.C. Official Code § 2-502(18) (2006 Repl.).

⁶ Terms in the D.C. FOIA statute have the same meaning as provided in D.C. Official Code § 2-502 (2001), including the term “public body.” D.C. Official Code § 2-539 (2001).

In principle, all such items should be made available upon request unless covered by one or more of the exemptions from disclosure contained in the D.C. FOIA statute. D.C. Official Code § 2-534 (2006 Repl.). These items, however, would have to be specifically requested through a properly lodged FOIA request which can then be reviewed and considered in due course.

(5) "Whether the communications, written and electronic, between members of the Board, the officers and/or the staff and the staff of the schools under its jurisdiction are available without charge to ANCs or, at the very least, subject to FOIA?"

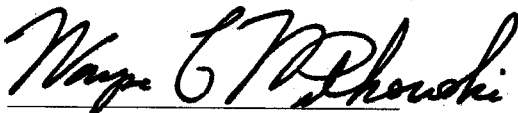
See answer to question 4, above. Certainly, non-exempt documents in the possession of the PCSB would be subject to disclosure. However, because the charter schools themselves are not part of the District government, but instead are non-profit entities (D.C. Official Code § 38-1802.04(c)(16) (2006 Supp.)), I do not believe that they would be subject to FOIA requirements.

As for whether the ANC would have to pay for such documents, I find no exception either in the ANC Act or in the D.C. FOIA statute that expressly exempts ANCs from payment of applicable fees. On the other hand, any such disclosing entity may, pursuant to 1 DCMR § 408.9, waive fees when it is deemed to be either in the public interest or in the interest of the agency to do so. I understand that there is somewhat of a tradition of doing so when document requests are made by an ANC.

If you have any questions, please contact Wayne C. Witkowski, Deputy Attorney General, at 202-724-5524.

Sincerely,

LINDA SINGER
Acting Attorney General for the District of Columbia



By: WAYNE C. WITKOWSKI
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LS/dps (AL-07-164)